Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORMAN A. GERMINO, PETITIONER

V.

DEPARTMENT OF DEFENSE

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

EMILE JOSEPH HENAULT, JR.
Attorney at Law
Henault & Sysko, Chartered
306 Crain Highway, North
Glen Burnie, Maryland 21061
(410) 768-9300

QUESTION PRESENTED

Whether, in reviewing a removal action taken by an agency pursuant to 5 U.S.C. § 7512 and § 7513, whose underlying basis is the revocation of an employee's security clearance, the Merit Systems Protection Board may exclude from consideration related statutes, executive orders, directives, and agency regulations to the detriment of an employee's constitutional procedural due process entitlements.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NO.

NORMAN A. GERMINO

v.

DEPARTMENT OF DEFENSE

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

EMILE J. HENAULT, JR., attorney for the petitioner, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The unreported decision of affirmance without opinion under Fed.Cir. R. 36 by

the Court of Appeals for the Federal Circuit (App., infra, 1a-8a) was decided on April 5, 1995. The opinion of the Merit Systems Protection Board (App., infra, 9a-31a) is reported at 61 M.S.P.R. 683. The initial decision by a presiding official of the MSPB (App., infra, 32a-48a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions of 5 U.S.C. 7512, 7513, and 7701, as set forth in App., infra, 49a-52a.

STATEMENT

The petitioner, a preference eligible veteran, was hired to serve in the excepted service at the National Security Agency (hereinafter "NSA" or "agency") as a Language Technician, GG-09, on December

30, 1974. At the time of his removal by the agency on January 31, 1992, the petitioner was employed as a Language Analyst, GG12.07. The agency's removal of the petitioner began on March 13, 1990, when the agency suspended the petitioner's access to classified information pending further investigation into issues outlined in the agency's Request for Clearance Suspension, dated March 9, 1990, (C.A. App. 832-834)[1]. The petitioner remained in pay status and was assigned temporary duties within the agency that did not require access to classified information. On January 3, 1991, NSA's Office of Security recommended that petitioner's security clearance be revoked, which revocation was concurred in by the Assistant Deputy Director for

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[1] "C.A. App." cites are to the joint appendix to the petitioner's brief in the Court of Appeals for the Federal Circuit.

Administration that same day (C.A. App. 842-846). On March 19, 1991, NSA's Office of Civilian Personnel notified the petitioner that, pursuant to NSA/CSS PMM 30-2, Chapter 370 (hereinafter "Chapter 370"), the petitioner had been found to be ineligible for continued access to classified information and thereby failed to meet a mandatory condition of employment, and that he had the right to respond to both the security access determination and the proposed removal action orally, in writing, or both (C.A. App. 829, 830). He was also to be allowed to review the official records relied upon to support the reasons for the proposed action, but the agency failed to allow this review and did not fully respond to the petitioner's requests for discovery.

On March 26, 1991, Emile J. Henault, Jr., Esquire, entered his appearance for

the petitioner (C.A. App. 818, 820) and filed an FOIA request with the agency (C.A. App. 822, 824, 825). On April 9, 1991, Mr. Henault submitted a request for discovery to the NSA General Counsel (C.A. App. 805-814). (The majority of the discovery information sought from the General Counsel was not covered by the FOIA request.) A series of correspondence ensued between Mr. Henault and the agency concerning Mr. Henault's discovery request (C.A. App. 753, 754, 756-758, 763, 765, 766, 768-770, 772-774, 778-780, 782, 783, 788, 790, 792, 793, 795-798, 800, 801). On August 26, 1991, the agency finally informed the petitioner that it had no formal discovery policy (C.A. App. 782), and that "he got all he was going to get" (C.A. App. 758).

Concurrently with the foregoing requests, the petitioner initiated FOIA

requests to the State Department (C.A. App. 619) and the CIA (C.A. App. 623) for relevant information concerning his employment with those agencies. On November 1, 1991, Mr. William P. Crowell, the NSA Chief of Staff who had set the original parameters for the petitioner's response to the agency's proposed removal action, was suddenly replaced by Mr. Donald L. Parsons as chief arbiter of the petitioner's case. Mr. Parsons immediately refused to allow the petitioner to finish building his case, and denied the extensions requested by the petitioner's attorney in order to complete discovery (C.A. App. 753). The petitioner protested, but to no avail (C.A. App. 577-581, 756-758). Mr. Parsons' predecessor had understood the complexities of the petitioner's case, and had granted extra time for the petitioner to obtain

information for his defense. Mr. Parsons, on the other hand, later admitted under oath that he lacked expertise in personnel removal actions, and that he was not familiar with the NSA regulations governing the case (C.A. App. 1379, 1390-1392). The upshot of Mr. Parsons' entry into the petitioner's case was the unkept promise of discovery that had earlier been given by Mr. Crowell, and the spectacle of Mr. Parsons serving as the deciding official in the petitioner's case, despite the fact that he had no experience in such matters (C.A. App. 1379, 1390-1392). Mr. Parsons forced the petitioner to submit his incomplete written response under protest on November 21, 1991. On December 3, 1991, an oral hearing was held before Mr. Parsons[2], at which time the petitioner

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[2] The petitioner complained that the agency violated Chapter 370, Section 4-5b, which provides

supplemented his earlier written reply with an appendix containing FOIA information received from the FBI. At that time, the State Department and the CIA had not responded to the petitioner's FOIA requests, nor had the agency (having stalled for eight months) provided the discovery information requested by the petitioner on April 9, 1991 (C.A. App. 805-814). Mr. Parsons' hearing of the petitioner's case amounted to a "futile

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that the Deputy Director for Administration (DDA) shall dispose the action, and Chapter 370, Section 4-7(d)(1) which provides that the deciding official (DDA) may not delegate the hearing of the oral reply, except for furlough actions. In promulgating Sections 4-5b and 4-7(d)(1) the Director, NSA, understood that the severity of a removal action requires judgment by an experienced and qualified official. There is no other agency written delegation of authority for a substitute deciding official.

ritual[3]." See Ricucci v. United States, 425 F.2d 1252, 1254 (1970). Mr. Parsons, who was supposed to be an impartial deciding official, actually joined the agency's investigative team and personally conducted a post-hearing investigation, the results of which he later relied on to make his decision to remove the petitioner[4] (C.A. App. 727-729). The petitioner was never given an opportunity to respond to Mr. Parsons' post-hearing "finding". The petitioner later discovered Mr. Parsons' role as investigator when he was

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[3] In view of Mr. Parsons' conduct, the petitioner's hearing before him was a "futile ritual" in that the allowance of an oral reply implies an intent that the employee may be successful with it at times given that he has been provided all the facts. The petitioner did not have all of the facts, nor was the investigation complete at the time of the oral hearing. Id. Ricucci at 1254.

[4] Id. Ricucci at 1254 stressed, "that the right to answer charges orally is not met by appearance before the investigators who have developed facts to substantiate the charges."

confronted with Mr. Parsons' "report" during the initial MSPB hearing[5].

The petitioner was removed from his employment with the agency on January 31, 1992, (C.A. App. 724-725). He then appealed to the Merit Systems Protection Board (hereinafter "MSPB" or "Board").

The MSPB presiding official ruled that the petitioner was entitled to appeal his removal under 5 U.S.C. §§ 7701(a), 7512, 7511(a)(1)(B), and that the Board's inquiry would be limited to determining

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[5] The conduct of Mr. Parsons displayed his personal motive to dismiss Mr. Germino so directly and strongly that his conduct was an insensitive practice which should have been avoided, as espoused in Burkett v. United States, 402 F.2d 1002, 1007 (1968). Mr. Parsons in making his final decision should have exercised impartiality and satisfied due process. His prejudice and lack of familiarity with the agency's regulations raise doubts about the fidelity of Mr. Parsons' stewardship of the hearing and his adherence to the requirement of impartiality without the bias of institutional loyalty. "To perform its high function in the best way, justice must satisfy the appearance of justice." Schweiker v. McClure, 456 U.S. 188, 196 (citations omitted), 197 (1982).

whether the petitioner received the procedural protections of 5 U.S.C. § 7513 (hereinafter "7513").

On June 19, 1992, the presiding official in the petitioner's case concluded that:

> 1) retention of a security clearance was a requirement of the petitioner's position, petitioner's security clearance was revoked, and reassignment to a nonsensitive position was not required; 2) the agency complied with the procedural requirements of § 7513 and related agency regulations governing adverse actions; and 3) the agency afforded the petitioner the required minimal due process in revoking his security clearance.

On July 24, 1992, the petitioner filed a timely petition for Board review of the initial decision, raising the following objections to the initial decision:

> 1) the agency violated its own regulations in removing the petitioner; 2) the agency's notice to the petitioner was defective; 3) the agency's deciding official was not qualified to perform such a function and later chose to become an investigator; 4) the agency provided redacted documents to the petitioner and unredacted documents

to the agency's deciding official and MSPB presiding official; 5) the MSPB presiding official improperly disallowed the petitioner's witnesses; and 6) the MSPB presiding official's concept of minimum due process was at variance with Department of the Navy v. Egan, 484 U.S. 518 (1988)[6].

On April 21, 1994, the full Board issued its opinion and order affirming the initial decision as modified by the Board's opinion and order.

The Board wrongly disposed of the petitioner's argument concerning the denial of his witnesses by finding that he had not objected to the denial. (CA. App. 16). The Board did not understand that the "issue" described by the MSPB administrative judge (CA. App. 1310,

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[6] The petitioner testified before the MSPB that he never received specific notice of the charges (CA. App. 1431, L15-17), and that there was no way he and his attorney "could conceivably understand what it was all about." (CA. App. 1430, L 10-19). The petitioner's statements concerning lack of reasonable notice were not contradicted by the agency at the initial hearing.

1312, 1313, and 1450), when he stated, "I preserve your objection of my failure to decide those as issues..." (CA. App. 1450), concerned both subject matter issues and witness issues.

In addition, the Board stated that the petitioner did not allege violation of his statutory rights. Id. Germino v. Department of Defense, 61 M.S.P.R. 683, 687 (1994). This premise is false. 5 U.S.C. § 7513 procedural requirements regarding notice and opportunity to respond were always an issue in this case as evidenced by pretrial submissions of record and the fact that the MSPB administrative judge clearly stated on many occasions during the prehearing and hearing that he would limit his judicial horizons to minimal due process as espoused in Egan, and Weissberger v. U.S. Information Agency, 39 M.S.P.R. 370

(1988). The petitioner's attorney, summarizing his argument, stated, "I think that, just to quote, that I understand Egan; I understand Weissberger, and I think that from a procedural standpoint, the agency didn't fulfill its commitments to Mr. Germino." (CA. App. 1453 L4-7). The agency also identified these "statutory rights" by referring to Egan and Weissberger (CA. App. 1445 L12-16). The administrative judge used Weissberger in discussing the legal sufficiency of procedural protections. (CA. App. 30).

On August 5, 1994, the petitioner requested the United States Court of Appeals for the Federal Circuit to review the Board's opinion and order.

The petitioner raised the following issues in his brief to the Court of Appeals for the Federal Circuit:

1) the agency's misuse of Public Law No. 86-36 to deny the

> petitioner information subsequently used by the agency at the initial MSPB hearing was not in accordance with the law and is harmful error, all of which denied petitioner a fair hearing, meaningful notice, and minimum due process; 2) the agency denied petitioner's due process entitlements by violating its own regulations in removing the petitioner from his employment; 3) the agency's denial of reasonable discovery to the petitioner, at a meaningful time and in a meaningful manner, adversely affected his ability to respond to the agency's action, and resulted in a denial of minimum due process; 4) the administrative judge erred in refusing to allow petitioner to produce witnesses and raise issues of procedure; 5) the petitioner was denied minimum due process when the agency withheld information from the petitioner's attorney regarding the petitioner's transfer to the Department of State; and 6) the Board's review (a) was arbitrary, capricious, an abuse of discretion and not in accordance with law, (b) obtained without procedures required by law, rules, or regulations, and (c) unsupported by substantial evidence.

On April 5, 1995, the United States Court of Appeals for the Federal Circuit issued a decision affirming the Board's opinion and order. In its decision, the

Court of Appeals for the Federal Circuit found that the Board correctly determined that the agency had provided the petitioner with all of the procedural protections to which he was entitled under § 7513, but the Court decision failed to comprehend the petitioner's argument regarding the agency's misuse of PL 86-36.

REASONS FOR GRANTING THE PETITION

It is imperative that this Court exercise its power of supervision in the petitioner's case to decide a federal question bearing on the application of laws by the Federal Circuit and the Merit Systems Protection Board, which are conflicting in the usual course of judicial proceedings.

The Board erroneously ruled that the petitioner was afforded his statutory due process rights under § 7513. In so doing the Board did not adequately address the

petitioner's arguments concerning defective notice of the charges, the inability of the agency's deciding official to provide a fair hearing, the failure of the agency to follow the procedures outlined in its own regulations, the misuse by the agency of P.L. 86-36 to deprive the petitioner of information later used by the agency's deciding official, and the minimum due process requirements to which the petitioner is entitled under § 7513.

The failure of the Board to uphold the petitioner's procedural entitlements within the full due process standards and scope of review as established by law and precedent denied the petitioner his constitutionally protected due process entitlements, and demonstrated that the Board could not distinguish between procedural due process for a removal

action and the administrative process of an underlying security clearance determination.

The Board's decision stands as the dispositive reported opinion on these issues, because the United States Court of Appeals for the Federal Circuit, in its unreported decision, affirmed the Board[7], and in the process further distorted § 7513 and agency procedural requirements by misconstruing PL 86-36[8]. The Court of Appeals for the Federal Circuit has exclusive jurisdiction over government petitioners and, except in certain

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[7] Germino v. DOD, 94-3366, Decided April 5, 1995.

[8] The Court also erroneously misleads one to believe that the three charges it specifies in its decision (page 2) are offenses that the petitioner acknowledged he committed. There is no evidence of such acknowledgment by the petitioner in the entire record. In fact, the agency's record is full of confusing and confused charges that were never specifically identified. Thus, the petitioner was required to speculate about the subject matter of the charges he was required to defend or explain.

discrimination cases, over employee petitions for review of MSPB decisions (see U.S.C. 7703(b) and (d)). Thus, this decision will have an adverse effect on the ability of government employees to exercise their constitutionally protected procedural due process entitlements, and petitioner believes it is plainly wrong.

The issues in this case do not concern the underlying merits of the agency's revocation of petitioner's security clearance. This case concerns the petitioner's entitlement to minimum due process pursuant to the laws, statutes and agency regulations which apply in this case. In reviewing the legal sufficiency of the procedural aspects of the security clearance revocation, one is required to be cognizant of petitioner's preremoval procedural rights required by agency regulations, minimum due process

procedures required by § 7513, and the due process rights granted by legal precedent.

The National Security Agency Act of 1959 (hereinafter "NSA Act") empowers the Secretary of Defense, or his designee, to establish NSA positions and appoint employees thereto "as may be necessary to carry out the functions of such agency." 50 U.S.C. § 402 note. By virtue of the NSA Act, employees who are preference eligible veterans in the "excepted" service are covered by the removal provisions of the Civil Service Reform Act of 1978 (hereinafter "CSRA") §§ 7511-7513. Pursuant to the Department of Defense Directive No. 5100.23 (May 17, 1967), entitled "Administrative Arrangements for the National Security Agency", the Secretary of Defense delegated his NSA Act appointment authority to the NSA Director, who implemented this authority by

promulgating regulations covering both the hiring and removal of NSA employees. Chapter 370 of these NSA regulations describes procedures for removing employees, and states generally that removal is permissible for "such cause as will promote the efficiency of the service..." Id., at Chapter 370, §§ 3-4. Dismissals proposed under Chapter 370 guarantee employees various procedural protections such as 30-day advance notice before the action can be taken, advance written notice stating the specific reasons for the proposed action, an opportunity to reply orally and/or in writing, a reasonable amount of time to prepare the reply and to furnish affidavits and other documentary evidence in support of the reply, review of documentation on which the proposed action is based, legal representation, and a

final decision and the specific reasons upon which the decision was based[9]. Chapter 370 also provides a further right to appeal to the MSPB for preference eligible employees, such as the petitioner, who is covered by the CSRA[10].

NSA may also exercise removal actions under § 7532[11], which provides that "(n)ot withstanding other statutes," an agency head "may" remove employees "in the interest of national security," if they are given a preremoval hearing; or under 50 U.S.C. 833[12], which provides that the Secretary of Defense "may" remove NSA

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[9] Chapter 370, Section 4-6 **Entitlements**.

[10] Chapter 370, 4-10 **Appeal Rights**.

[11] Section 7532 of Title 5 of the United States Code was passed in 1950 and reenacted and codified in 1966, as part of Chapter 75 of Title 5.

[12] In 1964 Congress amended The Internal Security Act relating to "Personnel Security Procedures in the National Security Agency." 78 Stat. 168, 50 U.S.C. 831-833 (NSA Personnel Security Procedures Act).

employees upon determining that termination procedures in other statutes "cannot be invoked consistently with national security." These removal actions are reserved for cases involving national security concerns. They are an alternative recourse to NSA's ordinary removal mechanism pursuant to the NSA Act. Although the NSA Act does not refer to termination, the Court has held as a matter of statutory interpretation that, absent a "specific provision to the contrary, the power of removal from office is incident to the power of appointment[13]." Petitioner does not dispute this general proposition. Petitioner argues that where "for cause" procedures for removal under § 7513, or under the regulations adopted

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[13] *Keim v. United States*, 177 U.S. 290, 293 (1900); see also *Crenshaw v. United States*, 134 U.S. 99, 108 (1890); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961).

under the NSA Act, do not jeopardize national security, recourse may be had pursuant to procedures in § 7513 in conjunction with NSA's regulations, which are binding on both the government agency and eligible employees. See Carlucci v. Doe, 488 U.S. 93 (1988).

§ 7513 procedures are similar to those specified in Chapter 370 removal procedures.[14]

§ 7513 carries the right to MSPB review to provide checks and balances on whether proper procedures were followed in the denial of a clearance, and on whether the

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[14] Section 7513 (b) procedural entitlements provide for 30-days advance written notice, a reasonable time to answer orally and in writing, representation by an attorney, and a written decision and specific reasons therefor. In addition, Section 7513 (c) provides that "(a)n agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section." Section 7513(d) authorizes the employee against whom action is taken to appeal to the MSPB under 5 U.S.C. Section 7701.

suspension or removal was justified by the denial of the clearance. However, Chapter 370 removal procedures entitle the employee to additional procedural safeguards in excess of the § 7513 removal safeguards; namely, "written notification of the opportunity to review the documentation upon which the proposed action is based" (§4-6.e.); "an amount of official time, if the employee is in a duty status, to work on the reply" (§4-6.f.); and "if an employee chooses to reply to the notice of the proposed action, he or she may, within the allotted time period, provide a written reply, request to meet with the deciding official, or both. The deciding official may not delegate the hearing of the oral reply, except for furlough actions." (§ 4-7.d.). The deciding authority is specified in §4-5.b.(1) which states "the

Deputy Director for Administration (DDA) shall dispose the action."

The agency selectively uses another set of standards in reviewing security clearances and in granting employee procedural entitlements. Director of Central Intelligence Directive No. 1/14 (hereinafter "DCID 1/14"), effective April 14, 1986, sets forth minimum personnel security standards and procedures governing eligibility for access to sensitive compartmented information (SCI) for all United States Government civilians. DCID 1/14, Annex A, "Adjudication Guidelines" sets forth a common approach to be followed by the Intelligence Community for SCI access. This common approach consists of carefully weighing a number of variables known as the "whole person" concept[15]. The agency

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[15] DCID 1/14, Annex A, provides that the (continued...)

subscribes to DCID 1/14 in making security clearance determinations.

DCID 1/14, Annex B, "Appeals" establishes a common appeals procedure for the denial or revocation of access to SCI. The agency has discretion to adjust the procedural standards set forth in Annex B[16], but only marginally exercised this leverage in the petitioner's case. In considering § 7513 and DCID 1/14 procedural safeguards for NSA employees

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[15](...continued)
ultimate determination in granting SCI access consistent with the interests of national security shall be an overall common sense determination predicated on all available information with "...careful scrutiny to the following matters: a. loyalty, b. close relatives and associates, c. sexual considerations, d. cohabitation, e. undesirable character traits, f. financial irresponsibility, g. alcohol abuse, h. illegal drugs and drug abuse, i. emotional and mental disorders, j. record of law violations, k. security violations, and l. involvement in outside activities.

[16] DCID 1/14, Annex B, "Appeals" does not affect applicant or personnel actions pursuant to Public Law 88-290, Public Law 86-36, or other applicable law."

who are subjected to suspensions or removal actions, it is obvious that the Chapter 370 removal procedures, to which an employee is entitled, is an amalgamation of employee procedural entitlements espoused in § 7513 and DCID 1/14. The agency has exercised its discretion in mandating these entitlements by promulgating Chapter 370 removal procedures for the benefit of its employees, and therefore must abide by these removal procedures in affording an employee procedural due process. In reviewing procedural entitlements of NSA employees, one cannot impose § 7513 procedures alone, since NSA provides additional procedural entitlements for its employees in Chapter 370 removal procedures. Conversely, NSA has not incorporated into its regulations all of DCID 1/14 procedural entitlements, which

provide more safeguards than those found in Chapter 370 removal procedures.

The Federal Circuit has historically recognized the imperative of procedural safeguards. "In the case of a Government employee the courts will not inquire into the merits of a dismissal (for want of a security clearance): They will inquire whether required procedures have been observed, or an applicable statute violated." Greene v. McElroy, 254 F.2d at 953 (citations omitted); see Vitarelli v. Seaton, 253 F.2d 338, 342-343 (D.C. Cir. 1958), rev'd on other grounds, 359 U.S. 535 (1959)[17]; (Emphasis Added).

The narrow question presented in Egan

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[17] The reversal in Id. Greene was based on the absence of presidential or congressional authorization for the procedure leading to the dismissal. The reversal in Vitarelli was based on procedural flaws in the dismissal. The Court did not contradict the court of appeals' statements in those cases that the merits of security clearance determinations are unreviewable.

was whether the MSPB has authority by statute to review the substance of a decision to deny or revoke an underlying security clearance in the course of reviewing an adverse action. Id. Egan at 520. Mr. Egan did not challenge that the Navy did not afford him procedural due process or that the Navy did not follow its own regulations in its removal action.

Egan at 530 held that, in an appeal under § 7513(d), the Board does not have the authority to review the substance of an underlying security clearance determination in the course of reviewing an adverse action, because a clearance denial is not one of the enumerated adverse actions that are subject to board review[18].

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[18] "adverse actions" which the Board may review under Section 7512 Board authority are "1) a removal; (2) a suspension for more that 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less."

However, "An employee who is removed for "cause" under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute[19]. The Board then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further."

In the aftermath of Egan, the MSPB stated that "the Board will review only the procedures utilized by the agency to

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[19] Section 7513(b) procedural entitlements include (1) at least 30 days written notice stating the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) representation by an attorney; and (4) a written decision and the specific reasons therefor at the earliest practicable date; and, under Section 7513 (c), "An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section."

insure that it afforded the employee procedural due process." The Board then defined "minimal due process," explaining it as being all that the employee would be entitled to before Board review, namely, the procedural protections of §7513. Weissberger v. U.S. Information Agency, 39 M.S.P.R. 370 (1988).

In the petitioner's case, the Board erroneously refused to address petitioner's contention that the administrative judge may review due process procedures as outlined under agency regulations. The Board opined that the agency's procedural regulations do not apply in the case of a negative security determination; therefore, the agency's procedural regulations also do not apply in the related removal action[20]. This non

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[20] The Board reasoned that the agency's regulations at Chapter 370 cover disciplinary and (continued...)

sequitur shows that the Board misconstrued Egan in this case. Egan agreed that the Board has no authority to review an underlying security clearance revocation, because it is not an adverse action in its own right. However, Egan clearly stated that the Board has authority to review § 7512 adverse actions--which include removal actions. The Board's refusal to review the agency's application of its procedural regulations in removing the petitioner, simply because the removal action was preceded by a security clearance determination, is not supported by Egan and its progeny. Agency

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[20](...continued)
adverse actions, namely "involuntary actions which reprimand, suspend, enforce leave, separate for disability, remove, reduce in pay or grade, and furlough for 30 days or less." "The regulations do not, we find, include negative security clearance determinations. Therefore, the agency's procedural regulations do no apply to those determinations." Id. *Germino* at 688.

regulations provide for the employee to respond to both the revocation of his security clearance and his dismissal for the efficiency of the service at the time the agency decides to dismiss the employee. At that time, the agency's procedural due process is given to the employee pursuant to agency regulations which include full procedural due process for both the revocation and removal actions. The Board is authorized pursuant to § 7512 to review both of these actions because, according to agency regulations, they are collateral. The Board's unilateral denial of this due process to the petitioner is plainly arbitrary and capricious to the extent that it constitutes harmful error. The CSRA, §§ 7512-13 provides for MSPB review of removals and certain other adverse personnel actions affecting civilian

employees of the government, such as the petitioner. This statute does not suggest that the Board does not have the authority to review procedural due process in negative security determinations. See Pangarova v. Department of Army, 42 M.S.P.R. 319, 32 (1989) (In light of Egan, the Board does have the authority to determine whether an employee has received due process.) See also Jones v. Department of the Navy, 48 M.S.P.R. 680, 692 (1991) wherein the Board stated: "Furthermore the procedures followed by the agency before the appellants were indefinitely suspended provided them an opportunity consistent with Egan to persuade the agency that its decisions were ill-founded. See Engdahl, 900 F.2d at 1576." The Board has been zealous in pruning its authority to review removal actions under the limitations of "minimal

due process". Woroneski v. Department of the Navy, 39 M.S.P.R. 366 (1988). See Id. Jones at 692, wherein the Board stated: "[e]xcept for determining that the appellants were afforded minimal due process, the Board is precluded from reviewing constitutional claims in connection with the merits of the agency's suspension of the security access and its procedures for reviewing their security clearances." (Emphasis added).[21]

Egan did not mandate to the Board that its authority to review the legal sufficiency of procedural protection was limited to "minimal due process" under § 7513, to the exclusion of agency regulations predicated on Executive authority under the U.S. Constitution,

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[21]The procedural review was not an issue, as the employee stipulated that the procedures the Navy followed satisfied legal requirements. Id. Jones at 692.

Article II, § 2. The Board, being a constituted arm of the Executive Branch of the Government is required to consider procedures handed down to agencies by Executive orders and the agency regulations which are enacted as a result of this delegation of authority by the President. The Board's premise in Id. Weissberger is misplaced as it deprives the petitioner of his constitutionally protected due process entitlements.

In reviewing the Board's decision, one must consider the statutes defining the Board's authority. The Board is required to "hear, adjudicate, or provide for the hearing and adjudication, of all matters within the jurisdiction of the Board." § 1205 (a)(1). In § 7512 (1) and § 7513 (d) Congress assigned the Board appellate review of removal actions taken against "employees" pursuant to subchapter II of

Chapter 75.[22] The Board first raised the "minimal due process" standard of review in Egan, 28 M.S.P.R. at 519-520, wherein it held that it had authority to review the procedures used by the agency in order to ascertain whether the agency afforded Mr. Egan "minimal due process[23]." The Board's "minimal due process" proclamation essentially limited its scope and standard of review of removal procedures that are preceded by security clearance revocations. The petitioner has not been apprised of any statutory support for the Board's concept of "minimal due process." The petitioner questions whether the founding fathers intended that "due process" should be divided into bits and

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[22] Removal pursuant to 5 U.S.C. 7512 carries entitlement to the procedures set forth in 5 U.S.C. 7513.

[23] Mr. Egan did not assert a failure of the Navy to follow its regulations or any statute.

pieces. If we agree that the Board is responsible for ensuring that an employee receive due process, it must also be responsible for exercising this responsibility by being cognizant of other statutes and agency regulations in its scope of review; otherwise, the Board is abdicating its responsibilities under §§ 7512-13, and the Board's review of the application of due process entitlements is meaningless. The Board should, indeed must, include agency procedural regulations and statutory entitlements in its scope of review[24]. If the Board cannot

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[24] In the petitioner's case, the Board refused to consider agency regulations which the petitioner said were violated, and the misuse of PL 86-36 by the agency, because these did not fit the Board's tortured interpretation of "minimal due process." The Board specifically stated that the agency's procedural regulations did not apply. *Germino v. Department of Defense*, 61 M.S.P.R. 683, 688 (1994). The Board completely ignored the petitioner's claim that the agency violated PL 86-36, thus depriving him of specific notification of the charges and a meaningful hearing, and further skated around most

(continued...)

fit statutory violations and agency procedural violations into its concept of "minimal due process," the petitioner should not be legally hobbled as a result of the Board's shortsightedness. The Board is not authorized to discard these viable issues when they are brought to the Board's attention, but, instead, has a duty and obligation to remedy misapplication of agency procedural regulations and statutory violations, according to the constitutional laws at its disposal. The petitioner maintains that the Board does not have the discretion to ignore these pivotal due process issues. The petitioner's removal "for cause" by the agency "for the

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[24](...continued)
of the other procedural issues raised by the petitioner, by indicating the Board could not delve into agency procedural regulations and therefore the procedural issues raised by the petitioner deserved no consideration under "minimal due process."

efficiency of the service" pursuant to Chapter 370 provides the petitioner with procedural safeguards in excess of the Board's "minimal due process" procedures (§7513). These agency regulatory procedures, authorized by the President, do not fly in the face of § 7513, but are coincidental. The Board must recognize this authority unless preempted by statute. The Board has not shown this to be the case[25]. In the areas of the President's Article II duties "the courts have traditionally shown the utmost deference to Presidential responsibilities." United States v. Nixon, 418 U.S. 683, 710 (1974). "Thus,

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[25] The President is authorized under the U.S. Constitution, Article II, Section 2, to classify and control access to information bearing on national security. The petitioner's access and procedural removal entitlements flow primarily from this constitutional investment of power in the President and exist separate from any explicit Congressional grant. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961).

unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." See, e.g., Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Burns v. Wilson, 346 U.S. 137, 142, 144 (1953); Gilligan v. Morgan, 413 U.S. 1, 10 (1973), Schlesinger v. Councilman, 420 U.S. 738, 757-758 (1975); and Chappell v. Wallace, 462 U.S. 296 (1983).

In the wake of Egan and Weissberger, the Federal Circuit provided additional guidelines regarding an employee's procedural due process. The United States Court of Appeals for the Federal Circuit stated in Griffin v. Defense Mapping Agency, 864 F.2d 1579, 1580 (Fed.Cir 1989), "..That the Supreme Court's decision in Egan did not create a new substantive right to transfer to a

nonsensitive position, and that the Board's role in reviewing the feasibility in such transfer is limited to where "that substantive right is available from some other source, such as statute or regulation."(Emphasis added).

In Lyles v. Department of the Army, 864 F.2d 1581 (Fed. Cir. 1989), the Court, addressing reassignment to a nonsensitive position, stated, "(T)he Army must abide by its own regulation, even if it is more rigorous than necessary" (citing Morton v. Ruiz, 415 U.S. 199, 235 (1974) and other citations omitted); "(and) the Board, according to Egan, may review the Army's efforts under this regulation to reposition Lyles."

In Jamil v. Secretary, Department of Defense, 910 F.2d 1203, 1208, (4th Cir. 1990), the Court made it clear that an agency may change its regulations, but

until it does so, affected employees may require the agency to follow procedures which the agency itself has promulgated. The Court specifically stated:

"While this Court may lack the power to review the merits of the decision to revoke Jamil's security clearance, it still possess the authority to require an agency like the DMA to follow its own regulations in making a security clearance determination and in dismissing an employee. See Hill v. Department of the Air Force, 844, F.2d 1407, 1412 (10th Cir. 1988) ("Courts do have the power to compel agencies to follow their own regulations"). See also Egan, 484 U.S. at 530, 108 S.Ct. at 825 ("An employee who is removed for "cause" under Section 7513, when his clearance is denied, is entitled to the several procedural protections specified in that statute."). An agency

like the DMA may change its regulations, but, until it does so, an affected employee may require the agency to follow the procedures which it itself has promulgated."[26]

The Court also explained that Jamil did not have a property or liberty interest in his security clearance, therefore, he had no constitutional rights to procedural due process in connection with its revocation; consequently, any claims to procedural protection must be grounded in statutes and regulations. Jamil distinguished property or liberty interest in a security clearance as being clearly separate from property interest in continued employment, indicating that "Jamil did have a property interest in his continued employment..."

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[26] Jamil did not question the Egan holding concerning underlying security determinations, but asserted DMA failed to follow the procedures required by its own regulations, an issue which was not raised in Egan.

This concept is not surprising, as the Fourteenth Amendment's procedural protection of property is a safeguard that a person has already acquired in specific benefits. The petitioner has a property interest in his employment. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, n.3.

The principle of Service v. Dulles, 354 U.S. 363 (1957), and its progeny, establishes that judicial review is and should be available. The regulations and statutes which set forth reviewing authority must be applied to preserve the rule of law and protect the integrity of the regulations and statutes in individual cases. See Service v. Dulles, 354 U.S. 353 (1957). If the agency is using its regulations and statutes in removal actions, it is improvident for the Board to ignore them in the Board judicial

review process simply because they do not conveniently fit into a rote interpretation of Board review under § 7513[27]. Nevertheless, this is exactly what the Board did in its interpretation of Egan. See Id. Jones at 692.

The Board has created a double standard for applying the laws regarding a federal employee's constitutional due process procedural entitlements in "for cause" removals, in that the Federal Circuit provides one set of standards based on Egan, while the Board provides a different set of standards based on Egan.

Chapter 370 describes procedures for

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[27] 5 U.S.C. 7701(c)(2) provides: "Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--(A) shows harmful error in the application of the agency's procedures in arriving at such decision; (B) shows that the decision was based on any prohibited personnel practice described in Section 2302(b) of this title; or (C) shows that the decision was not in accordance with the law."

removing employees for "such cause as will promote the efficiency of the service." §§ 3-4. Although Chapter 370 assigns to preference eligible veterans the right to appeal a removal action to the Board, nonveteran employees at NSA do not have this right. NSA nonveteran employees may only appeal the agency's decision through the courts of the Federal Circuit, provided they have standing. See Carlucci v. Doe, 488 U.S. 93 (1988).

A reasonable inference would suggest that an employee's procedural entitlements in "for cause" removal actions would be observed diligently in order to avoid misconduct in their application in view of Egan and its progeny. The procedural guidance in Egan concerning Board review of security-clearance related removals is narrowly construed by the Board. The Board totally disregards agency

regulations and other statutes which provide agency employees with greater procedural safeguards than those contained in § 7513. The agency employee is subjected to conflicting law without solid precedent and defined boundaries. The burden of refutation placed on the employee is made overwhelming by the Board's review standard for § 7513 procedures, which disregards agency regulations and other statutes, despite the holdings of the Federal Circuit, as established post-Egan in Id. Lyles, Griffin, and Jamil. The Federal Circuit, on the other hand, gives deference to agency procedural regulations in "for cause" removals in its interpretation of Egan, holding that an agency may change its regulations (to conform with § 7513) but, until it does so, an affected employee may require the agency to follow

the procedures which the agency itself has promulgated. Id. Jamil at 1412. Meanwhile, the Board only looks at § 7513 in reviewing "for cause" removals, insisting it is precluded from taking a broader view of the case when an employee's security clearance has been suspended or revoked; thus the Board disregards the agency's procedures used in these removals. Id. Jones at 692. See Id. Germino at 688, concerning the petitioner, wherein the Board refused to review his procedural due process rights under agency regulations. The point in controversy concerning agency procedural regulations is a lack of agreement on stare decisis between the Board and the Federal Circuit, because an established and accepted legal precedent, under which rights may accrue, is nonexistent. One ironical result of this is that

nonveterans in the excepted service, who are compelled to seek redress through the Federal Circuit are provided with more due process than veterans in the excepted service, who are compelled to seek redress through the CSRA. The veterans receive minimal due process in Board cases because the Board does not follow the Federal Circuit in the doctrine of stare decisis. This discrepancy between the Federal Circuit and the Board denies federal employees, such as the petitioner, equal protection and due process under the law, which, in its present application by the Board, is, inter alia, prejudicial to veterans in the excepted service. There is a compelling need for the Court to set a government-wide standard to which review authorities shall adhere.

The National Security Agency Act of 1959, 50 U.S.C. 402 note (May 29, 1959),

P.L. 86-36, 73 Stat. 63., is commonly referred to by agency officials as "Public Law 86-36". The purpose of this legislation is to exempt NSA from the provisions of the Classification Act of 1949, as amended[28], for reasons of national defense. This allows NSA to withhold personnel data from the Civil Service Commission--data normally required by the Commission to perform its audit under the Classification Act[29]. PL 86-36, Section 6, provides that the agency is not required to disclose information about its organization or functions and activities, or the names, titles, salaries or numbers of persons employed by the agency. PL 86-36 is used by the agency to withhold

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[28] Now covered by chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees.

[29] For the legislative history of the 1959 NSA Act, Pub. L. 86-36, 73 Stat. 63, see 1959 U.S. Code Cong. and Adm. News, pp. 1534-36.

administrative, organizational and functional information which the agency decrees should be protected in the interest of national defense. However, the agency routinely releases this type of information by means of its NSA Newsletter and other public media.[30] The agency also selectively "redacts" other kinds of information from documents it uses in removal actions by using black grease-pencil obliterations. Thus, an employee asking for documentation in a removal action will receive documents containing redacted information about agency

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[30] A random sampling of the NSA Newsletter for 1990-1991 (unclassified) prepared for the information and enjoyment of NSA employees and their families (as well as NSA retirees), provides a plethora of detailed information concerning the names, organizations, titles and functions, and activities of the agency. NSA Newsletter Volume XXXVIII, No. 1 (January 1990), Volumes XXXIX, No. 2 (February 1991), No. 3 (March 1991), No. 4 (April 1991) No. 9, (September 1991), No. 10 (October 1991) and Volume XL, No. 3 (March 1992). See also NSA organizations chart (unclassified) published in the agency's report to the MSPB at its Exhibit 4jj.

organizations, functions, and other matters vital to the employee's defense against the agency's charges. The redacted information is justified as a PL 86-36 exemption. The agency's use of its discretion in PL 86-36 redactions in employee removal actions is totally arbitrary and devastating to the employee's efforts to answer the agency's charges.

The agency thus evades its responsibility to inform the employee of the subject matter relied on by the agency to remove the employee. This selective redaction of information by the agency in "for cause" removals amounts to prosecuting the employee for events which he knows nothing about. The agency's censorship deprives the employee of specific notice and a meaningful hearing, thus taking away the employee's right of

free speech necessary to defend himself against agency charges. A reasonable inference would be that the agency's misuse of PL 86-36 constitutes prior restraint of an individual's right to free speech in a public forum (Board). The petitioner was further damaged by the agency's failure to comply with Chapter 370, §4-7.b.(2), which provides that information which may not be disclosed to the employee or his representative may not be used to support the reasons in the notice of proposed dismissal[31].

The Board completely ignored the petitioner's argument that he was deprived

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[31] The Court in Id. Green at 953 held that "[c]ertain principles have remained relatively immutable in our jurisprudence. One of the principles is that where governmental action obviously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

of adequate notice by the agency because the agency misused PL 86-36 to redact data from the notice that was given to the petitioner. These data were later provided to the agency deciding official and the Board in an unredacted version not available to the petitioner[32]. The agency deciding official testified under oath that he used the unredacted notice to make his final decision. This unfair double standard used by the agency to deprive the petitioner of the notice to which he was entitled was fatally prejudicial to the petitioner as it deprived him of a fair opportunity to oppose his removal. Burkett v. United States, 402 F.2d 1002, 1004 (1968). Burkett at 1004 also advises

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[32] NSA PMM Chapter 370, Section 4-7 b., "Advance Notice of Proposed Action", provides that the agency will present to the employee, inter alia, a statement outlining the specific charges and the details of the infraction sufficient for the employee to make an informed reply.

that notice of the proposed action must inform the employee of the charges with "sufficient particularity to apprise him of the allegations he must refute or acts he must justify[33]."

The information contained in the notice package provided to the agency deciding official and the Board, (but not to the petitioner), was harmful to the petitioner in that he was not apprised of the charges against him, was not given a fair opportunity to respond, and was not given a fair hearing[34]. The procedural

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[33] The agency argued that petitioner's procedural rights were not prejudiced nor was he caused substantial harm by the redacted information. The petitioner argued to the contrary, as the information denied to the petitioner under this agency premise constituted bad notice, as it significantly hobbled, complicated and prejudiced his ability to respond to the notice and defend himself. Id. *Burkett* at 1007.

[34] Failure by the agency to provide an (continued...)

protection afforded to the petitioner was thus inferior to that called for in Chapter 370, and consequently constitutes harmful error. In Stephen v. Dept. of the Air Force, 47 M.S.P.R. 672, 681 (1991), the Court held that "under § §7701(c)(2)(A), the Board cannot sustain an agency's decision in any case if the employee shows harmful error in the application of the agency's procedures in arriving at such decision." "Reversal of an action for harmful error is warranted where the procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the

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[34](...continued)
identical notice package to the petitioner resulted in 1) lack of specificity of the charges as to statements made by persons alleging them; 2) lack of specificity as to the persons who made the charges; 3) indefiniteness as to the subject matter; 4) undue generality as to the agency's charges; and 5) exclusion of the information required by the petitioner to defend himself. *Burkett at 1004*

case before the agency" (Citations omitted).

The agency had no legal authority to misuse PL 86-36 by providing the Board with unredacted data not provided to the petitioner. This discrimination by the agency is unlawful in its entirety. The Board should have reversed such action as "not in accordance with law" under § 7701(c)(2)(C). Stephen at 684. The agency's conduct in misusing PL 86-36 also damaged the petitioner by not providing him with "minimum procedures that satisfy the institutional requirements of due process of law. Under Loudermill, 470 U.S. 532, 105 S.Ct. 1487, the action must be reversed because it cannot withstand constitutional scrutiny." Stephen at 684. The agency's conduct in misusing PL 86-36 also deprived the petitioner of access to the "case record," and therefore he was

unable to review all of the agency's evidence. This significantly prejudiced his case and violated his minimum due process entitlements. Dozier v. United States, 473 F.2d 866, 868 (1973).

The result of the manipulation of PL 86-36 by agency officials not only deprived the petitioner of crucial information to which he was entitled, but seriously hobbled the petitioner's ability to gather information in his defense for his written and oral responses to the agency. Subsequent to the initial hearing at the MSPB, the petitioner, pursuant to § 7703(c), submitted additional data to demonstrate to the Board the harmful effect of the agency's actions. The Board casually dismissed these data submitted by the petitioner, citing C.F.R. § 1201.114(i), and holding that they "related to the agency's security

determinations underlying the removal action and, therefore, are outside of the Board's scope of review." Id. Germino at 686. The Board's rejection was misplaced, as the petitioner had informed the Board in his submissions that the data were being submitted to demonstrate procedural irregularities by the agency (not bearing on the underlying security determination) which harmed him by denying him an opportunity to explain the charges against him. (CA. App. 1480). The agency's conduct deprived him of specific notice[35], a meaningful hearing before the agency deciding official[36], and an opportunity to respond to the portion of the record

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[35] Chapter 370 Sections 4-6.a. and b. - notice and specific reasons; 5 U.S.C. 7513(b)(4) - notice and specific reasons.

[36] Chapter 370 Section 4-7.d. - employee may meet with the agency deciding official who will hear the oral reply.

sequestered by the agency[37] through its misuse of PL 86-36.

The evidence before the Board in the petitioner's case concerned the procedural issues only and not substantive underlying security determinations. The Board compounded the agency's mistakes by denying the petitioner his constitutional due process rights in ignoring the procedural issues on the pretext that they were inextricably interwoven with the underlying security determination. The fact is that the security clearance determination and the removal process are collateral, not interwoven.

CONCLUSION

There is a compelling need to set government-wide standards in order to provide fairness and uniformity in

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[37] Chapter 370 Section 4-6.c. - opportunity to reply orally and/or in writing.

procedures used to adjudicate removal-action cases which involve a prior suspension or revocation of an employee's security clearance. In the petitioner's case the Board and the Court of Appeals for the Federal Circuit did not ascertain whether the agency complied with its own regulations and statutes.

For the above reasons, it is respectfully submitted that the Court issue a writ of certiorari to the Court of Appeals for the Federal Circuit in the petitioner's case.

Respectfully Submitted:

EMILE JOSEPH HENAULT, JR.
Attorney for the Petitioner
HENAULT & SYSKO, CHARTERED
306 Crain Highway, North
Glen Burnie, Maryland 21061
(410) 768-9300

Norman A. Germino

NORMAN A. GERMINO, Petitioner

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

94-3366

NORMAN A. GERMINO,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

Decided: April 5, 1995

BEFORE RICH, NEWMAN, and SCHALL,

Circuit Judges.

SCHALL, Circuit Judge.

DECISION

Norman A. Germino petitions for review of the April 21, 1994 final decision of the Merit Systems Protection Board (Board) affirming his removal from the National Security Agency (agency). Germino v. Department of Defense, Docket No. DC0752920272-I-1. We affirm.

DISCUSSION

This court must affirm the Board's decision unless it is found to be 1) arbitrary, capricious, an abuse of discretion; or otherwise not in accordance with law, 2) obtained without procedures required by law, rule or regulation having been followed, or 3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1988).

Mr. Germino was removed from his position as a Language Analyst following an agency decision to revoke his security clearance, the retention of which was a

mandatory condition of employment. The agency determined that Mr. Germino was ineligible for continued access to classified information because he had engaged in 1) the unauthorized removal and subsequent storage of classified information in unsecured spaces, 2) the disclosure of classified information to unauthorized persons, and 3) the disclosure, to unauthorized persons, of the identities of several intelligence officers in sensitive assignments. Mr. Germino has acknowledged committing each of these offenses.

On appeal, Mr. Germino contends that, in affirming his removal, the Board abused its discretion, made findings which were not in accordance with law, and denied him minimum due process under 5 U.S.C. § 7513.

Under 5 U.S.C. § 7513, an agency employee who is the subject of a removal action is entitled to 1) at least 30 days'

advance written notice stating the specific reasons for the proposed removal, 2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer, 3) representation by an attorney or other representative, and 4) a written decision and the specific reasons therefor. 5 U.S.C. § 7512 (1988 & Supp. II 1990); 5 U.S.C. § 7513(b) (1988). However, §§7512 and 7513 do not apply to, and the Board therefore lacks authority to review, an agency's denial of an employee's security clearance. Department of the Navy v. Egan, 484 U.S. 518, 530 (1988); Brockmann v. Department of the Air Force, 27 F.3d 544, 546 (Fed. Cir. 1994) (citing Egan, 484 U.S. at 530); see 5 U.S.C. §§ 7512, 7513(b). Nevertheless, "an employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in

that statute." In such cases, the Board may determine "whether such cause existed," and "whether in fact clearance was denied." Egan, 484 U.S. at 530.

In view of the evidence of record, we hold that the Board's decision was not arbitrary, capricious, an abuse of discretion, or obtained without procedures required by law. Neither the Board nor this court has authority to review the agency's denial of Mr. Germino's security clearance. With regard to Mr. Germino's removal, however, the Board and this court may determine whether the agency provided Mr. Germino with the procedural protections specified in § 7513. Upon review of the record, we find the the agency provided Mr. Germino with advance written notice of 1) the proposed removal, 2) the fact that the removal action was the result of the agency's denial of his security clearance, and 3) the specific offenses which resulted

in his clearance being denied. The agency also provided Mr. Germino with eight months to respond, an opportunity to be represented by an attorney or other representative, and a written decision enumerating the reasons for his removal. Accordingly, we find that the Board correctly determined that the agency provided Mr. Germino with all of the procedural protections to which he was entitled under § 7513.

Mr. Germino's claim that the agency improperly deleted certain classified information from the documentation it provided to him, even if true, does not support his contention that the agency failed to provide him minimum due process under § 7513. The agency is entitled to prevent classified information from entering the public domain. See National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63 (codified as

amended at 50 U.S.C. § 402 note (1988)). Mr. Germino fails to cite any authority for the proposition that the agency was obliged to provide him with the classified information at issue. Additionally, Mr. Germino fails to show how the agency's deletion of this information resulted in harmful error. 5 U.S.C. § 7701(c)(2)(A) (1988).

Mr. Germino's contention that the agency failed to observe its own personnel procedures in removing him is also without merit. Mr. Germino cites no authority in support of this argument and, additionally, fails to show how any such alleged failure by the agency resulted in harmful error. Id.; 5 C.F.R. § 1201.56(b)(1) (1994).

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United States Court of Appeals for the Federal Circuit

94-3366

NORMAN A. GERMINO,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). DC0752920272-I-1

This CAUSE having been heard and considered it is ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart
FRANCIS X. GINDHART, Clerk

DATED: April 5, 1995

ISSUED AS A MANDATE: MAY 30, 1995

APPENDIX B

Norman A. Germino, Appellant,

v.

DEPARTMENT OF DEFENSE, Agency.

DC0752920272-I-1.

Merit Systems Protection Board.

April 21, 1994.

Employee petitioned for review of initial decision that sustained agency's action removing him from his position following revocation of his security clearance. The Merit Systems Protection Board held that agency afforded employee minimum due process rights.

Petition denied; case reopened; initial decision affirmed as modified; removal action sustained.

Member Antonio C. Amador issued opinion concurring in part and dissenting in part.

OPINION AND ORDER

This case is before the Board upon the appellant's timely petition for review of

the June 19, 1992 initial decision that sustained the agency's action removing him from his position. For the reasons discussed below, the Board **DENIES** the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, **REOPENS** the case on its own motion under 5 C.F.R.§ 1201.117, and **AFFIRMS** the initial decision as **MODIFIED** by this Opinion and Order, still **SUSTAINING** the removal action.

BACKGROUND

The appellant filed with the Board's Washington, D.C., Regional Office a timely appeal of the agency's January 31, 1992 action removing him from his Language Analyst position for failure to meet a mandatory condition of employment due to a prior determination that he was ineligible for continued access to classified information based on his involvement in: (1) The unauthorized removal and

subsequent storage of classified documents in unsecured spaces; (2) the divulgence of classified information to unauthorized individuals; and (3) the disclosure of the identities of several intelligence officers in sensitive assignments. Appeal File (AF), Tab 1 and Tab 5, Subtabs 4b, 4cc. The agency attached to the removal proposal notice two investigative memoranda describing the alleged underlying misconduct. In his defense, the appellant alleged, inter alia, that the agency committed harmful error because it failed to follow applicable statutory and regulatory procedures in effecting his removal, failed to afford him due process in revoking his access to classified information, and failed to adequately notify him of the reasons for the security clearance ineligibility determination. See, e.g., AF, Tabs 1, 15, 16.

After affording the appellant a

hearing, the administrative judge, in his initial decision, sustained the removal action. The administrative judge first noted that it was undisputed that retention of a security clearance was a condition of the appellant's employment, that the agency had revoked his security clearance, and that there was no requirement that the agency reassign him to a nonsensitive position. He then found that the agency had complied with the procedures set forth at 5 U.S.C. § 7513 and its own regulations in effecting the appellant's removal and that the agency had afforded the appellant minimum due process in revoking his security clearance. See Initial Decision (I.D.) at 3-8.

In his petition for review, the appellant challenges the administrative judge's findings on the issues of the alleged agency procedural errors made

below, reiterating his arguments in support of his harmful error contentions. He also contends that the administrative judge erred by rejecting certain of the issues he identified for adjudication and denying him his requested witnesses and an opportunity to fully examine one of the agency's witnesses. The agency has timely responded in opposition to the petition for review.

[1] The appellant also filed, after the close of the record on review, a reply to the agency's response and various documents that he contends are based on new and material evidence. See Petition for Review (PFR) File, Tabs 4-7. The documents consist of affidavits by certain persons interviewed by the agency's investigator that indicate that the investigator's report was misleading, supporting evidence, and other investigatory material. See id., Tabs 5-

7. Even if these submissions were unavailable before the record closed on review, we will not consider them because they relate to the agency's security determinations underlying the removal action and, therefore, are outside of the Board's scope of review. See 5 C.F.R. § 1201.114(i); Weissberger v. U.S. Information Agency, 39 M.S.P.R. 370, 374 (1988).

ANALYSIS

The agency afforded the appellant his minimum due process rights in removing him from his position.

[2] In Jones v. Department of the Navy, 48 M.S.P.R. 680, 689-90 (1991), aff'd, 978 F.2d 1223 (Fed.Cir.1992), the Board held that an agency may indefinitely suspend an employee based on the suspension of his security access, or pending its investigation of his security clearance, where the agency believes that

his retention in a duty status would be detrimental to government interests. Citing Department of the Navy v. Egan, 484 U.S. 518, 527-32, 108 S.Ct. 818, 824-26, 98 L.Ed.2d 918 (1988), we further found that the Board lacks authority to review the merits of an agency's suspension of an employee's security access. See Jones, 48 M.S.P.R. at 689-90.

[3] In Kriner v. Department of the Navy, 61 M.S.P.R. 526 (1994), the Board again addressed the rule in Jones. We there reaffirmed that an agency may indefinitely suspend an employee based on its prior action with respect to his security access, and that the Board may not inquire into the merits of the agency's reasons for the security access decision; we nonetheless held that we must assure that minimum due process requirements were accorded in the indefinite suspension action. Thus, where

an indefinite suspension is based on the revocation of access to security areas or information, the agency must provide the appellant with a meaningful opportunity to respond to the reasons for the indefinite suspension by ensuring that either in the advance notice of that action, or in the earlier access determination, he has been notified of the cause that led to the access determination. Because an employee against whom an adverse action such as an indefinite suspension is taken is entitled to notice of the specific reasons for that action and to an opportunity to address those reasons in his response to the agency's proposal, only in this manner does the agency assure that the appellant is afforded meaningful due process with respect to his constitutionally protected property interest in his employment. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S.Ct.

1487, 1495, 84 L.Ed.2d 494 (1985); Stephen v. Department of the Air Force, 47 M.S.P.R. 672, 681 (1991).

Applying that ruling to the facts of this case, we note that, before the agency removed the appellant, it informed him, in its 30-day removal proposal notice and in its supporting investigative memoranda, of the reasons for the revocation of his security clearance. See AF, Tab 5, Subtab 4cc. It specifically informed him that the revocation was based on his alleged unauthorized removal and improper storage of classified documents, divulgence of classified information to unauthorized individuals, and disclosure of the identities of several intelligence officers. Id. It also provided him with an opportunity to "reply to the security access determination and this proposed removal..." Id. We find that this notice was sufficient to satisfy the appellant's

minimum due process rights, as well as his right to notice under 5 U.S.C. § 7513(b)(1), and that the appellant was afforded meaningful due process in the agency's action removing him from his position.

[4] We further note that the appellant challenges the administrative judge's statement in the initial decision that he did not allege violation of his statutory procedural rights. See PFR at 10; I.D. at 3-4. He argues that he specifically alleged in his appeal that the agency had violated 5 U.S.C. chapters 75 and 77, as well as related laws, statutes, directives, and regulations. PFR at 10. We note, however, that the appellant did not allege below that the agency violated any specific provision of 5 U.S.C. § 7513. See AF, Tabs 1, 15, 16. On review, the appellant challenges, as we will further discuss below, only the administrative

judge's finding that the agency did not violate its own regulations in the removal process. See PFR at 10, 21-23. Even assuming that the administrative judge erred in this regard, we find that such error did not prejudice the appellant's substantive rights inasmuch as the administrative judge ultimately correctly concluded that the agency afforded the appellant his due process rights under 5 U.S.C. § 7513. See Weissberger, 39 M.S.P.R. at 373; Karapinka v. Department of Energy, 6 MSPB 114, 6 M.S.P.R. 124, 127 (1981); I.D. at 3-4; Hearing Transcript (Tr.) at 9; see also AF, Tab 5, Subtabs 4b-4k, 4m, 4p, 4r-4t, 4x-4y, 4aa, 4cc.

The appellant has not shown harmful error by the agency in the application of its regulations.

[5] The appellant reiterates his contention made below that, in removing him, the agency failed to follow its

regulations at NSA/CSS PMM 30-2, chapter 370, sections 4-5(b) and (d), 4-8(a), and 4-8(c)(3), which provide that: (1) The Deputy Director for Administration (DDA) shall dispose of adverse actions and may not delegate the hearing of the oral reply except for furloughs; (2) the DDA shall document his final decision and state the reasons upon which he based the decision; and (3) information obtained in the course of the decision process may be used in reaching a final decision provided that the employee has access to that information and an opportunity to respond to it. PFR at 11, 21-23. The appellant contends that the agency violated these provisions of its regulations because the DDA delegated his decision-making function to his Chief of Staff (the deciding official), whose final decision did not adequately set forth the reasons upon which it was based. See id. at 11-12.

Regarding the DDA's delegation, NSA/CSS PMM 30-2, chapter 370, section 4-5(b), provides in pertinent part that, where "Chief, M3 has proposed an adverse action [such as the instant action, the DDA] shall dispose the action." AF, Tab 5, Subtab 4kk. There is nothing in the regulation that prohibits delegation of the DDA's deciding authority and, thus, the appellant has not shown error here. Moreover, even if he had shown error, his bare assertion that he was harmed by the delegation because the deciding official delegated "lacked the skills and background to perform this function, even if he would have been legally entitled to serve as deciding official," is insufficient to establish harm. PFR at 19; see Stephen, 47 M.S.P.R. at 681.

The appellant further argues that the administrative judge may review procedural due process under the agency's

regulations. See PFR at 16. We note that the agency's regulations at NSA/CSS PMM 30-2, chapter 370, cover disciplinary and adverse actions, namely, "involuntary actions which reprimand, suspend, enforce leave, separate for disability, remove, reduce in pay or grade, and furlough for 30 days or less." AF, Tab 5, Subtab 4kk, NSA/CSS PMM 30-2 at 231. The regulations do not, we find, include negative security clearance determinations. Therefore, the agency's procedural regulations do not apply to those determinations.

The appellant has failed to show that the agency did not allow him adequate discovery in preparing his response to the removal charges.

The appellant contends that the agency did not afford him adequate discovery in responding to the removal charges and therefore violated its own procedures at NSA/CSS PMM 30-2, chapter 370, section 4-

6, because he could not fully respond to the charges, as required by those regulatory procedures. See PFR at 23-26; see also AF, Tab 5, Subtab 4kk. We note that the applicable provision of the agency's regulations states that an employee subject to adverse action procedures is entitled to an opportunity to reply orally and in writing to the agency's charges. See AF, Tab 5, Subtab 4kk, NSA/CSS PMM 30-2, chapter 370, section 4-6(c). Because, as we found above, the agency fully met its obligation to provide the appellant with an opportunity to respond to the charges, both orally and in writing, as required under 5 U.S.C. § 7513, we find no merit to the appellant's contention.

The appellant has not shown error by the administrative judge in his prehearing rulings.

The appellant contends that the

administrative judge erred by rejecting nine of the issues he identified for adjudication below, i.e., issues E, F, G, H, J, K, L, N, and O. See Appellant's Hearing Submissions at 6-8, AF, Tab 15; PFR at 26. Issues E, G, H, J, K, and L relate to whether, in denying the appellant access to documents and information that may have been security-related, the agency denied him an adequate opportunity to respond both orally and in writing to the charges in the removal proposal notice. See AF, Tab 15, Appellant's Hearing Submissions at 6-7. Issues F and N relate, respectively, to whether the agency followed reasonable investigatory procedures so that the deciding official was able to review the case in accordance "with the provisions of DCID 1/4" and whether the agency erred by considering the appellant's conduct at the Department of State, which, the appellant

claims, had no nexus to the agency's removal action and allegedly resulted in his denial of an adequate opportunity to respond to the charges. Id.

[6] In his order summarizing the prehearing conference, the administrative judge rejected all of these issues on the basis that they related to matters that extended beyond the scope of the requisite minimum due process rights reviewable by the Board. AF, Tab 16. The appellant timely objected to the administrative judge's ruling excluding these issues. See id.; Tr. at 11-14. Because, however, these issues involve security determinations within the agency's discretion, the administrative judge correctly rejected them. See Weissberger, 39 MS.P.R. at 374.

[7] The appellant further contends that the administrative judge erred by denying all of his witnesses who, he

claimed, were expected to testify regarding procedures used by agency security and deciding officials in the removal process. See PFR at 26-28. In his order summarizing the prehearing conference, the administrative judge rejected these witnesses based upon his determination that their testimony related to issues that were not within the Board's scope of review. AF, Tab 16. The appellant did not object to the administrative judge's ruling below even though he was afforded an opportunity to do so. See id.; Tr. at 1-14. Therefore, we will not consider his untimely objection on review. See Whitehurst v. Tennessee Valley Authority, 43 M.S.P.R. 486, 491 (1990).

[8] Finally, the appellant contends that the administrative judge erred by not allowing him to examine an agency witness regarding the verification of the

appellant's service with the Department of State during the period when the alleged security breaches occurred. See PFR at 29-30. The administrative judge rejected the appellant's counsel's reason for the questioning-i.e., that he was not given proper notice of the charges because the record was incorrect-ruling that such notice was unrelated to the issues concerned in the appeal and went to the merits of the underlying reasons for the agency's action. Tr. at 55-57. The administrative judge correctly so ruled inasmuch as the Board has no jurisdiction over the merits of an adverse action based on a security clearance determination. See Egan, 484 U.S. at 530-31, 108 S.Ct. at 825-26, 98 L.Ed.2d 918.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

AMADOR, Member, issues an opinion concurring in part and dissenting in part.

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

OPINION, CONCURRING IN PART AND DISSENTING IN PART, OF ANTONIO C. AMADOR, MEMBER.

While I concur with the majority opinion sustaining the appellant's indefinite suspension, I must dissent from my colleagues' conclusion that the termination of the appellant's security access implicated due process concerns.

The Federal Courts Improvement Act of 1982 established the Court of Appeals for the Federal Circuit as an appellate forum with nationwide jurisdiction for the definitive adjudication of selected categories of cases. S.Rep. No. 275, 97th Cong., 2d Sess. 1-3(1982), reprinted in 1982 U.S.C.C.A.N. 11-13. The Federal

Circuit was given exclusive jurisdiction over, inter alia, final orders or final decisions of the Merit Systems Protection Board pursuant to section 7703(b)(1) and 7703(d) of Title 5. 28 U.S.C. § 1295(a)(9). Accordingly, no matter how strongly individual Board members may disagree with a precedential decision of the Federal Circuit, the Board is duty-bound to follow that precedent until such time as it is reversed by the Federal Circuit en banc, by the Supreme Court, or by legislative action.

In Jones v. Department of the Navy, 978 F.2d 1223 (Fed.Cir.1992), the Federal Circuit held that a Federal employee has no liberty or property interest in access to classified information, and the termination of that access therefore does not implicate any due process concerns. The Court stated:

> The petitioners contend that

they were denied procedural due process in the termination of their access to classified information because the agency did not give them full information about the basis for such termination; that because access to such material was a condition of their continued employment, such termination necessarily would have resulted in their suspension from employment; and that their indefinite suspensions, therefore, were effected in violation of their constitutional rights.

The argument fails because it rests upon a faulty premise. The petitioners did not have a liberty or property interest in access to classified information, and the termination of that access therefore did not implicate any due process

concerns.

Jones, 978 F.2d at 1225. My colleagues mistakenly conclude that an individual's expectations in a clearance might be a basis for a constitutional right; they have confused a constitutional right to due process and a property interest in employment with the agency's application of administrative procedures "which are intended to promote fairness and safeguard the rights of individual employees, but are not intended thereby to diminish Executive authority rooted in Executive responsibility." Hill v. Department of the Air Force, 844 F.2d 1407, 1412 (10th Cir.), cert.denied, 488 U.S. 825, 109 S.Ct. 73, 102 L.Ed.2d 49 (1988). In an appeal under 5 U.S.C. § 7513, based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance

determination. Department of the Navy v. Egan, 484 U.S. 518, 530-31, 108 S.Ct. 818, 825-26, 98 L.Ed.2d 918 (1988). Lacking that authority, we may not look to the sufficiency of the reasons for terminating a security access.

Today, my colleagues exceed their authority in deciding otherwise.

GERMINO.7

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

NORMAN A. GERMINO, Appellant, V.	DOCKET NUMBER DC0752920272-I-1
DEPARTMENT OF DEFENSE, Agency.	DATE:JUNE 19, 1992

Emile J. Henault, Jr., Esquire, Glen Burnie, Maryland, for the appellant.

LCDR R. Tyrone Kee, Esquire, Fort George G. Meade, Maryland, for the agency.

BEFORE
William C. Jenkins
Administrative Judge

INITIAL DECISION

INTRODUCTION

Appellant filed an appeal on February 19, 1992, from the action of the agency removing him, effective January 31, 1992. As a preference eligible employee in the excepted service who has completed one year of current continuous service in the same or similar positions, appellant is entitled to appeal his removal to the Board. 5 U.S.C. §§ 7701(a), 7512, 7511(a)(1)(B). For the following reasons, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Legal Standard Scope of Review

Appellant occupied the position of Language Analyst, GGD-12, at the agency's National Security Agency (NSA). The action of the agency removing him from this position was based on a determination that he was ineligible for continued access to classified information and that he thereby failed to meet a mandatory condition of employment. (Ag. File, Tabs 4b and 4cc). In considering appellant's appeal of this action, the Board is without authority to review the merits of the agency's revocation of the security clearance. Department of the Navy v. Egan, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988); Weissberger v. United States Information Agency, 39 M.S.P.R. 370, 373 (1988). The Board's inquiry is limited to a determination whether the appellant received the procedural protection of 5

U.S.C. § 7513, whether the position was classified as sensitive, and whether appellant was removed for failure to maintain the required security clearance. See Lyles v. Department of the Navy, 864 F.2d 1581, 1583 (Fed.Cir. 1989). In reviewing the legal sufficiency of the procedural aspects of a revocation action, the Board will determine whether the agency afforded minimal due process protection to the appellant. Weissberger, 39 M.S.P.R. at 373.

In its decision in Egan, the Supreme Court also stated that the Board may determine whether transfer to a nonsensitive position was feasible. Egan, 108 S. ct. at 825. The Court of Appeals for the Federal Circuit and the Board have subsequently interpreted this statement to require review of the feasibility of transfer to a nonsensitive position only if

that substantive right is available from some other statute or regulation. Griffin v. Defense Mapping Agency, 864 F.2d 1579, 1580 (Fed.Cir1989); Lyles, 864 F.2d at 1583; VanDuzer v. Department of the Navy, 41 M.S.P.R. 357, 361 (1989). In the absence of an agency regulation requiring reassignment to alternative positions, the Board may not review any efforts that an agency does undertake. Skees v. Department of the Navy, 864 F.2d 1576, 1578 (Fed. Cir 1989).

Retention of a security clearance was a requirement of appellant's position, appellant's clearance was revoked, and reassignment to a nonsensitive position is not required

Relevant statutory and regulatory provisions as well as the testimony of Donald L. Parsons, NSA Chief of Staff, establish that all NSA employees are required to be cleared for access to

classified information. Department of Defense (DOD) Directive 5100.23 thus specifies that all positions at NSA are designated "critical sensitive positions." (Ag. File, Tab 4hh - p. 203). Section 832(a) of Title 50, U.S.C. also provides that no person shall be employed by NSA unless he is cleared for access to classified information. (Ag. File, Tab 4ff). On the basis of this evidence the agency has thus established that retention of a security clearance was a requirement of appellant's position.

That appellant's clearance was actually revoked is not in dispute and is well documented. A March 19, 1991, memorandum recommending appellant's removal for failing to meet a mandatory condition of employment thus notes that his security clearance was revoked on January 3, 1991. (Ag. File, Tab 4dd). A related January 3, 1991, memorandum documenting that

revocation is also in the record. Id. - enclosure 3. Finally, the determination that appellant was ineligible for access to classified information was subsequently sustained by Mr. Parsons in December 1991. (Ag. File, Tab 4c).

As to his possible reassignment to another position, appellant has not identified any agency policy or regulation that requires such action. Under VanDuzer, 41 M.S.P.R. at 361, the feasibility of appellant's transfer is therefore not reviewable by the Board.

The agency complied with the procedural requirements of 5 U.S.C. §7513 and related agency regulations governing adverse actions

As to the procedural aspects of the case, the record shows that the appellant was given the notice and opportunity to respond required by 5 U.S.C. §7513. (Ag. File, Tabs 4cc, 4c; Appeal File, Tab 1 -

Appendix 8, appellant's written reply). Moreover, no violation of these statutory rights has been alleged. Appellant, however does contend that the agency failed to comply with several related provisions of its own adverse action regulations, NSA/CSS PMM 30-2 Chapter 370, Section 4 (Ag. File, Tab 4kk). The Board has held that an agency must follow its own regulations. See Myers v. Department of the Air Force, 28 M.S.P.R. 479, 482 (1985). Appellant thus alleges that Mr. Parsons' final decision of January 2, 1992, violated sections 4-6h and 4-8c(3) by failing to set forth the reasons on which it was based. Review of that decision discloses, however, that it specifically states that the proposed removal and the underlying charge that the appellant failed to meet a mandatory condition of employment were sustained. (Ag. File, Tab 4c). The reason for the agency's decision is therefore

identified and no violations of the above-cited sections is shown to have occurred.

Because the removal of appellant was proposed by the Director of Civilian Personnel, section 4-5(b) of the agency's regulations specifies that the Deputy Director for Administration (DDA) shall be the deciding official. The DDA, Eugene J. Becker, disqualified himself, however, and the agency then designated its Chief of Staff, William P. Crowell, to receive appellant's replies and decide the case. (Ag. File, Tab 4dd). In October 1991, after appellant had been granted several extensions to reply to the proposed action and to the revocation of the security clearance, Mr. Parsons became Chief of Staff and was designated to hear and decide appellant's case. (Ag. File, Tab 4i). It is appellant's contention that the designation of Mr. Parsons violated section 4-5b as well as section 4-7d(1), which

provides that the deciding official may not delegate the hearing of the oral reply. As to section 4-7d(1), it is clear that no violation occurred. Mr. Parsons, functioning as the deciding official, personally received appellant's oral reply on December 3, 1991, and did not delegate that function to anyone else. (Ag. File, Tab 4c.) I also find no violation of section 4-5b as a result of the designation of Mr. Parsons as deciding official. With the DDA's withdrawal, it is apparent that someone still had to serve as deciding official. Under these circumstances the agency's designation of the Chief of Staff, a position at a higher organizational level than the DDA (Ag. File, Tab 4jj), does not evidence a violation of its own regulations. In this regard, it was also the uncontradicted testimony of Dorothy J. Masterson, Chief of Employee Relations, that the Chief of Staff, under the agency's

delegations of authority, had the authority to decide a removal action and that that authority had simply been redelegated to the DDA.

Appellant's remaining allegations concern section 4-7b(1)(a), which addresses the specificity of a proposal notice, and section 7b(2), which states that information that cannot be provided to the employee cannot be used to support the adverse action. Appellant contends that the proposal notice of March 19, 1991, did not accurately identify the reasons for the security clearance revocation, and that the investigative material on which the revocation was based and which was given to him as an attachment to the proposal notice (App. Ex. 1) deleted information that was later included in the agency response (Ag. File, Tab 4cc) filed with the Board. These contentions concern the adequacy of the agency's revocation procedures, however,

and not the adverse action procedures that are the subject of the cited agency regulations. The security clearance denial is not itself an adverse action under 5 U.S.C. § 7513. Weissberger, 39 M.S.P.R. at 373. Section 4 of NSA/CSS PMM 30-2 Chapter 370 is therefore not applicable to the procedural concerns of appellant outlined in this paragraph. Those concerns will only be analyzed in terms of the agency's compliance with the minimum due process required by Egan.

The agency afforded appellant the required minimum due process in revoking his security clearance

The minimal due process right that must be afforded to an employee in revoking his security clearance are: (1) Notice of the denial or revocation; (2) a statement of the reason or reasons upon which the negative decision was based; and (3) an opportunity to respond. Weissberger, 39

M.S.P.R. at 374. The Board's review of the legal sufficiency of the procedural aspects of the revocation action is limited to determining whether the employee was given these protections. Id. at 373. For the following reasons, I find that the agency did meet the minimal due process requirements of Egan. First, the agency's March 19, 1991, notice specifically informed appellant that he was ineligible for continued access to classified information and advised him that this determination was based on:

> [his] involvement in 1) the unauthorized removal and subsequent storage of classified documents in unsecured spaces; 2) the divulgence of classified information to unauthorized individuals; and 3) the disclosure of the

identities of several intelligence officers in sensitive assignments.

(Ag. File, Tab 4cc). Attached to the notice were the two memoranda and related investigative material that were used to first suspend appellant's clearance in March 1990 and then revoke it in January 1991. (Ag. File, Tab 4cc). In view of the specificity of the notice and the inclusion of the supporting evidence relied on by the agency, I find no merit to appellant's contention that he somehow was not notified of the reasons for the revocation action. Similarly, I find completely unsupported appellant's allegation that he did not have an adequate opportunity to respond to the agency's charges. The March 1991 notice advised appellant that he could respond orally and in writing to the security access determination, and, at appellant's request, the period for responding was

extended approximately eight months. (Ag. File, Tabs 4d-4z). During this period appellant requested and was provided additional documentation. Id. Appellant eventually submitted an extensive written reply on November 21, 1991, and replied orally to Mr. Parsons on December 3, 1991. (Appeal File, Tab 1 - Appendix 8; Ag. file, Tab 4c).

Appellant, the record thus establishes, was clearly provided an opportunity to respond to the stated reasons for the revocation of his security clearance. No basis for altering this conclusion is provided by the evidence indicating that the supporting material furnished to appellant with the November 1991 notice deleted some information that was later included in the copy of the notice provided to the Board at Tab 4cc of the agency's response. In this regard, it was appellant's uncontradicted testimony that

the document identified as App. Ex. 1 was the actual proposal notice and related material furnished to him by the agency. A comparison of this document with the notice and attachments in the agency's response, Ag. file, Tab 4cc, does reveal that some agency organizational designations and the names of some agency employees were deleted from App. Ex. 1 and that one entire document, a letter from appellant to his wife (Ag. File, Tab 4cc, pp 104-108) was omitted from Ag. Ex.1. (Appeal file, Tabs 17 and 18 - appellant and agency responses comparing App. Ex. 1 and 4cc). The omission of this information, however, is not shown to have deprived appellant of an opportunity to respond to the stated reasons for the security clearance determination.

The testimony of appellant and his written reply to the ineligibility determination thus show that he was at all

times aware of the three specified reasons for the revocation of his clearance. Although appellant contends that a formal reply procedure that included a right to discovery should have been provided, no such procedure and no Board review of the desirability of such a procedure is required by Egan or Weissberger. Appellant was entitled to notice of the reasons for the revocation and an opportunity to respond. Those rights were clearly provided by the agency. In addition, although he argues that he was prejudiced by the omission of information from App. Ex. 1, he has not in any manner established that he was unable to respond to the specific charges concerning his handling of classified documents and his alleged disclosure of classified information and sensitive identities. For all of these reasons, I find that appellant's receipt of App. Ex. 1 did not deprive him of the

minimal due process rights required by Egan.

Having found that appellant's position required a security clearance, that the agency revoked that clearance, and that the agency satisfied the requirements of 5 U.S.C. § 7513 and afforded appellant his minimal due process rights, I conclude that the agency's charge is supported by a preponderance of the evidence and that appellant's removal must be sustained. VanDuzer, 41 M.S.P.R. at 362.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

William C. Jenkins
WILLIAM C. JENKINS
Administrative Judge

APPENDIX D

§ 7512. Actions Covered

This subchapter applies to-

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to-

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 if this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence ofimprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right -

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in this application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

Supreme Court, U.S.
FILED
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No. 95-57

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORMAN A. GERMINO, PETITIONER

v.

DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Merit Systems Protection Board correctly concluded that the National Security Agency complied with applicable procedural safeguards when it removed petitioner from employment because of the revocation of his required security clearance.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 52 F.3d 345 (Table). The decision of the Merit Systems Protection Board (Pet. App. 9a-32a) is reported at 61 M.S.P.R. 683. The decision of the administrative judge (Pet. App. 33a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1995. The petition for a writ of certiorari was filed on July 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Security Agency (NSA or agency) is an intelligence agency separately organized within the Department of Defense. The agency was established by Presidential Directive in October, 1952, and is responsible for conducting communications and signals intelligence activities and for providing security for United States government communications.

Congress has mandated that no person shall be employed by the agency or granted access to classified information, unless such employment or access is "clearly consistent with the national security." 50 U.S.C. 831. All NSA employees must, as a condition of NSA employment, be cleared for access to Sensitive Compartmented Information (SCI).[1] The criteria for SCI access have been established by the Director of Central Intelligence (DCI) pursuant to the National Security Act of 1947, 50 U.S.C. 403, and Executive Order No. 12,356, 3 C.F.R. 166 (1982 comp.).[2] See Director of Central Intelligence Direc-

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[1] SCI is not a statutory term, but instead describes a special access program developed by the Director of Central Intelligence. Congress recognized that NSA's mission involves highly sensitive cryptologic information (see 50 U.S.C. 832), and so it subjected that cryptologic information to restricted access programs designated by Executive Branch intelligence experts, including the Director of Central Intelligence (50 U.S.C. 834). Accordingly, the statute requires that all employees of NSA be eligible for access to classified information that, because of its sensitivity, is subject to restricted access programs. *Ibid.*

[2] On October 15, 1995, Executive Order No. 12,958 will supersede Executive Order No. 12,356. See 60 Fed. Reg. 19,825, 19,843 (1995). Section 4.4 of Executive Order No. 12,958

tive No. 1/14 (Nov. 1987), Pet. C.A. Br. App. A43-A61 (DCI Directive).[3]

If questions are raised concerning an employee's suitability for continued access to classified information, the NSA Director or his designate must apply established criteria to evaluate the individual's clearance status. An employee whose access to SCI is revoked may be afforded an opportunity for appeal within the agency if the clearance authority determines that such appeal would be "clearly consistent with the interests of the national security." DCI Directive Annex B, Pet. C.A. Br. App. A57.

Because all NSA positions require access to SCI, NSA employees who lose their clearance for access to SCI must be removed from their positions. See 50 U.S.C. 832. Although the National Security Agency Act of 1959, Pub. L. No. 86-36, 73 Stat. 63, exempts NSA employees from the civil service laws (see § 2, 73 Stat. 63), NSA employees faced with removal from their positions are afforded certain procedural protections. Under the authority of Public Law No. 86-36, as delegated by the Secretary of Defense, the Director of NSA has promulgated regulations governing personnel matters. National Security Agency/Central Security Service Personnel Management Manual (NSA/CSSPMM) 30-2. Chapter 370 of those regulations sets forth the general standards and procedures for removing an

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continues the authority of the DCI to establish special access programs pertaining to intelligence sources and methods. 60 Fed. Reg. 19,837 (1995).

[3] "Pet. C.A. Br. App." refers to the appendix to the brief filed by petitioner in the court of appeals. "C.A. Jt. App." refers to the joint appendix filed in the court of appeals.

employee for cause. The regulations require that the employee be provided with notice of the proposed removal, including a statement outlining the specific charge; the opportunity to respond to the charge (including the right to representation by an attorney or other individual); and a written final decision outlining the reasons for the action if the employee is removed. NSA/CSSPMM 30-2, ch. 370, §§ 4-7, 4-8, Pet. C.A. Br. App. A66-A68.[4]

Preference-eligible veterans, such as petitioner, who are employed by NSA are also entitled to appeal adverse NSA personnel actions to the Merit Systems Protection Board (MSPB). NSA/CSSPMM 30-2, ch. 370, § 4-10.a, Pet. C.A. Br. App. A69; see 5 U.S.C. 7511(a)(1)(B), 7512, 7701(a). Final decisions of the MSPB are subject to review by the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b)(1).

2. Petitioner was removed from employment as a language analyst at NSA following the agency's revocation of his clearance for access to SCI. The revocation of the clearance was based on petitioner's "unauthorized removal and subsequent storage of classified information in unsecured spaces, * * * disclosure of classified information to unauthorized persons, and * * * disclosure, to unauthorized persons, of the identities of several intelligence officers in sensitive assignments." Pet. App. 2a-3a; see C.A. Jt. App. 845. Before removing petitioner, NSA provided him with written notice of his proposed removal, and attached supporting investigative memoranda informing him of the specific reasons why his

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[4] Section 4, the pertinent section of Chapter 370, is reproduced at Pet. C.A. Br. App. A64-A69.

clearance had been revoked. Pet. App. 17a; see C.A. Jt. App. 829-830, 832-834, 842-846. The notice, which was dated March 19, 1991, afforded petitioner an opportunity to respond to both the clearance decision and the proposed removal. *Id.* at 829. Petitioner submitted a written response to the agency on November 21, 1991, and a hearing was held before Donald L. Parsons, the Chief of Staff of NSA, on December 3, 1991. On December 16, 1991, Parsons issued a final decision affirming the revocation of petitioner's clearance and sustaining petitioner's removal from employment at NSA. *Id.* at 724-729.

3. Petitioner appealed the agency's decision to the MSPB. On June 19, 1992, an administrative judge rendered the initial decision of the MSPB, sustaining the agency's action. Pet. App. 33a-49a. The administrative judge noted that the MSPB "is without authority to review the merits of the agency's revocation of the security clearance," *id.* at 34a (citing *Department of Navy* v. *Egan*, 484 U.S. 518 (1988)), and that the MSPB's inquiry is limited to determining whether petitioner received the appropriate procedural protections governing his removal from employment, and whether he received "minimal due process protection" surrounding the revocation of his clearance. Pet. App. 34a-35a. The administrative judge found that a security clearance was a requirement of petitioner's employment at NSA, that petitioner's clearance was revoked, and that the agency had complied with the procedural requirements of 5 U.S.C. 7513 (which governs termination for cause from government employment) and its own regulations in removing petitioner. Pet. App. 37a-43a. The administrative judge also found that, with respect to the revocation of his clearance, petitioner was

afforded basic due process, including notice of the action against him, a statement of reasons, and an opportunity to respond. *Id.* at 43a-49a.

The MSPB sustained the decision of the administrative judge. Pet. App. 9a-32a. The MSPB concluded that petitioner was afforded due process with respect to the revocation of his clearance, as the agency informed him of the basis for his clearance revocation and gave him the opportunity to respond to the clearance determination and the proposed removal. *Id.* at 17a. The MSPB also concluded that the agency had "afforded [petitioner] his due process rights under 5 U.S.C. § 7513" with respect to his removal. *Id.* at 19a. The MSPB ruled further that petitioner had not shown any prejudicial error from any alleged violation of agency regulations surrounding his removal, *id.* at 19a-23a, and it noted that the NSA regulations do not apply to the agency's decision to revoke petitioner's clearance, as distinguished from the removal action, *id.* at 22a.[5]

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a. The court ruled that NSA had complied with Section 7513 with respect to petitioner's removal by providing petitioner with

> advance written notice of 1) the proposed removal, 2) the fact that the removal action was the result of the agency's denial of his security clearance, and 3) the specific offenses which resulted in his clearance being denied * * * [as well as] eight months to respond, an opportunity to be repre-

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[5] One member of the MSPB dissented in part, and would have held that the MSPB could not consider the constitutional adequacy of the procedures used in the revocation of petitioner's clearance. Pet. App. 28a-32a.

> sented by an attorney or other representative, and a written decision enumerating the reasons for his removal.

Id. at 5a-6a. The court further held that any redaction of classified information by NSA from the documentation provided to petitioner was authorized by Section 6 of Public Law No. 86-36, 73 Stat. 64,[6] and did not violate any procedures to which petitioner was entitled. Pet. App. 6a-7a. In addition, the court found petitioner's contention that NSA violated its own regulations to be "without merit." *Id.* at 7a.

ARGUMENT

1. Petitioner contends (Pet. 16-17) that the court of appeals erred in affirming the MSPB's conclusion that NSA afforded him the process due under 5 U.S.C. 7513 when it terminated his employment. That fact-specific contention is incorrect. There is ample evidence in the record that NSA met the requirements of Section 7513, which entitled petitioner to the following procedural protections in his removal action:

> (1) at least 30 days' advance written notice * * * stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

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[6] Section 6 of Public Law No. 86-36 protects from disclosure information with respect to the activities of NSA, and the names, titles, salaries, and number of persons employed by NSA.

> (3) [the right to representation] by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. 7513(b).

NSA provided petitioner with more than the 30 days' notice required under Section 7513(b)(1). By letter dated March 19, 1991, ten months prior to petitioner's removal, the agency notified petitioner that he had "been found to be ineligible for continued access to classified information and thereby fail[ed] to meet a mandatory condition of employment." C.A. Jt. App. 829-830. The letter specified the reasons for petitioner's ineligibility, noting his involvement in "1) the unauthorized removal and subsequent storage of classified documents in unsecured spaces; 2) the divulgence of classified information to unauthorized individuals; and 3) the disclosure of the identities of several intelligence officers in sensitive assignments." *Id.* at 829. Attached to the letter were memoranda detailing the support for these reasons. See *id.* at 832-834, 842-846. Indeed, petitioner acknowledged his security violations. *Id.* at 727, 728, 729; Pet. App. 3a.[7]

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[7] Although petitioner now denies that he acknowledged committing the security infractions, Pet. 18 n.8, petitioner admitted in his hearing before the administrative judge that he "let information get out of secure channels." C.A. Jt. App. 1431. The court of appeals agreed that the record demonstrated his acknowledgement. Pet. App. 3a. That factual dispute is not one that this Court should resolve. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In addition, the question whether petitioner committed the underlying infractions pertains to the merits of the security clearance decision

The agency also met and exceeded the "reasonable time" requirement of Section 7513(b)(2), as NSA provided petitioner with eight months to prepare his response—far more than the required seven days. Petitioner was represented by counsel throughout the proceeding, as authorized by Section 7513(b)(3). See Pet. 4-5. Finally, NSA complied with Section 7513(b)(4) by providing petitioner with a written decision, discussing his security violations in depth. See C.A. Jt. App. 724-725, 727-729. Accordingly, the MSPB properly concluded that NSA had complied with Section 7513, and the court of appeals correctly affirmed.

2. Petitioner also contends that NSA violated its own regulations in removing him from employment, and that the MSPB failed to address his argument on that ground. See Pet. 32-41. The contention that the MSPB did not consider the argument is clearly incorrect, as the MSPB engaged in a detailed analysis of the issue. See Pet. App. 19a-23a. After discussing the NSA's regulations and petitioner's allegations of noncompliance, the MSPB found that petitioner had failed to demonstrate any harmful error in any of the agency's actions that were alleged to violate the regulations. *Id.* at 21a-23a.

Petitioner argues specifically that NSA violated Sections 4-6.a, b, and c of its regulations, which require 30 days' advance written notice of the proposed action with a statement of specific reasons, and an opportunity to reply. Those requirements, however, merely duplicate the requirements of Section 7513, which NSA met, as discussed above, pp. 7-8, *supra*.

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and is not subject to review by the MSPB or the courts. See *Department of Navy* v. *Egan*, 484 U.S. 518, 529-532 (1988).

Petitioner also asserts that NSA violated Section 4-7.b(2) of its regulations, which states that "[i]nformation which may not be disclosed to the employee or his or her representative or designated physician may not be used to support the reasons in the notice [of proposed personnel action]." Pet. C.A. Br. App. A67; see Pet. 55. Petitioner contends that NSA violated that regulation by redacting classified information from the supporting memoranda attached to the March 19, 1991, notice, while allowing the deciding official to see the unredacted memoranda. See Pet. 55-56; C.A. Jt. App. 832-834, 842-846, 905-909. That contention is incorrect.

NSA made two, separate decisions about petitioner: First, it revoked his clearance for access to SCI; second, it terminated his employment because he no longer had the requisite clearance. See *Jamil* v. *Secretary, Dep't of Defense*, 910 F.2d 1203, 1208 (4th Cir. 1990) (distinguishing between the two decisions). As the MSPB held (Pet. App. 22a), Section 4 of the NSA regulations applies only to the agency's removal decision, and not to the clearance determination. See NSA/CSSPMM 30-2, ch. 370, § 4-1.a, Pet. C.A. Br. App. A64 (Section 4 covers suspensions, enforced leave, pay and grade reductions, removals, separations for disability, and furloughs). The redacted memoranda state the reasons for the revocation of petitioner's clearance, not the reason for the termination of petitioner's employment.

Even if the redacted information was considered by the agency with regard to its decision to revoke petitioner's clearance, that use was governed, not by the NSA regulation cited by petitioner, but by DCI Directive No. 1/14. Under that Directive, when "clearly consistent with the interests of the national

security," the employee is entitled to notification of the revocation of his SCI access, the reasons for the revocation, and an opportunity to appeal to an agency official. See Pet. C.A. Br. App. A43, A57-A58. The procedures contain no requirement similar to that found in Section 4-7.b(2), the NSA regulation cited by petitioner.

Petitioner does not contend that he was denied the process due him under DCI Directive No. 1/14. He received notification of the clearance revocation decision, along with detailed information as to the reasons for the revocation. C.A. Jt. App. 829-830, 832-834, 842-846. In addition to the redacted memoranda, NSA furnished petitioner with other materials to assist in the preparation of a response, including a list of the classified documents found in petitioner's home. See *id.* at 643-649.

Finally, petitioner contends that NSA violated Sections 4-5.b and 4-7.d of its regulations. See Pet. 25-26, 61 n.36. Under Section 4-5.b, "the Deputy Director for Administration (DDA) shall dispose the [personnel] action," Pet. C.A. Br. App. A65, and under Section 4-7.d(1), "[t]he deciding official may not delegate the hearing of the [employee's] oral reply," Pet. C.A. Br. App. A67. Petitioner's argument appears to be based on the mistaken notion that the Deputy Director must personally decide each personnel action. As the MSPB correctly found, "[t]here is nothing in the regulation that prohibits delegation of the DDA's deciding authority." Pet. App. 21a. The language in Section 4-7.d prohibiting the deciding official from delegating the hearing of the oral reply means simply that the person who decides a case must also hear the oral reply. In petitioner's case, the DDA recused himself (see C.A. Jt. App. 827), and

the DDA's superior, the Chief of Staff, became the deciding official and also personally heard petitioner's oral reply, in accordance with NSA regulations. See Pet. App. 40a-41a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

SEPTEMBER 1995